



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muoki v Nyamai (Civil Appeal E233 of 2023)  
[2024] KEHC 14084 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14084 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E233 OF 2023**

**FR OLEL, J**

**NOVEMBER 13, 2024**

**BETWEEN**

**JOSEPH MAKEWA MUOKI ..... APPELLANT**

**AND**

**NICODEMUS MBINDYO NYAMAI ..... RESPONDENT**

**RULING**

1. The application before this court is the Notice of Motion application dated 24<sup>th</sup> September 2024 brought pursuant to provisions of Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 rule 1 of the Civil Procedure Rules and all other enabling provision of law and the main prayer sought is prayer (3) that; this court be pleased to issue an order of stay of execution of the judgment/decree issued in Machakos CMCC No E387 of 2022 pending the hearing and determination of the appeal filed herein. The application is supported by a supporting affidavit dated 24<sup>th</sup> May 2024, sworn by the Appellant; Joseph Makewa Muoki.
2. The applicant stated that judgement was entered against him on 7th August 2024, and aggrieved by the said judgement had filed this Appeal. Unless stay of execution was granted, he would suffer substantial loss and prejudice as execution would be levied to their loss and detriment. The applicant further averred that this appeal was brought without delay and that his insurer was ready and willing to provide a banker's bond as security for the Appeal.
3. This application is opposed by the Respondents who filed a Replying Affidavit dated 7<sup>th</sup> October 2024 sworn by his advocate Munyoki Muthangya. He maintained that Judgement had been entered in favour of his client in the sum of Kshs.6,387,646.23/= and they would not be opposed to this Application on condition that the Applicant be ordered to pay half the decretal sum of Kshs.3,190,944.50/= and deposit the other half of the said decretal amount in a joint interest-earning account held in the joint name of the advocates herein.



## Analysis & Determination

4. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit filed and discern that the only issue which arises for determination is whether this court should grant stay of execution of the Judgment/Decree dated 24<sup>th</sup> September 2024 issued in Machakos CMCC No E387 of 2022.
5. Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;
  - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
  - (2) No order for stay of execution shall be made under subrule (1) unless –
    - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
    - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
6. The three conditions to be fulfilled can therefore be summarized as follows;
  - a. that substantial loss may result to the applicant unless the order is made
  - b. application has been made without unreasonable delay
  - c. security as the court orders for the due performance
7. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -
  - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
8. To the foregoing I would add that an order of stay of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the same, shall also consider the overriding objective as stipulated under sections 1A and 1B of the *Civil Procedure Act*, which enables the court to give effect to the overriding objectives, while exercising its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. The Court, in exercising its discretion, should also always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.
9. The judgment before the trial Magistrate was delivered on 7<sup>th</sup> August 2024, and this Appeal was filed timeously on 30<sup>th</sup> August 2024. Thus, it can be said that this appeal and application for stay of execution have been filed timeously.
10. On the likelihood of suffering substantial loss, it was sufficient if an applicant seeking for stay of execution demonstrated that he/she would have to go through hardship to recover the decretal sum if paid to the respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful. See *G. N. Muema P/A (516) Mt View Maternity & Nursing Home Vs Miriam Maalim Bishar & Another* (2010) eKLR, *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another* (2006) eKLR.
11. Guided by the above authorities and in the absence of the requisite proof from the Respondent that he is a person of means, I find that the Appellant has satisfied this court that he would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
12. On the security, the Appellant has indicated that they are willing to provide a bank guarantee for the decretal sum, while the respondent proposes that they be paid half the decretal sum and the other half be deposited in a joint interest earning account pending the determination of the Appeal.
13. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his/her judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General Vs Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008*; *Kenya Shell Ltd Vs Kibiru & another* (Supreme); *Mukuma Vs Abuoga* (1988) KLR 645.

## Disposition

14. Taking all relevant factors into consideration, and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;
- a. The Appellant will pay the respondent a sum of Kshs.1,000,000/= and provide a bank guarantee of Kshs.2,000,000/= which guarantee will be specific to this Appeal and shall be valid for the entire period of the Appeal.



- b. These conditions are to be met within 60 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
  - c. The parties are to agree on the auctioneer's proclamation costs or the same to be taxed and be paid by the Applicant.
15. The costs of this Application will be in the cause.
16. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Team this 13<sup>th</sup> day of November, 2024.

In the presence of: -

Mr. Ouko for Appellant

Mr. Masila for Respondent

Susan/Sam Court Assistant

